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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 503

EMERSON R. GYNN, *Petitioner*

v.

MARY P. GYNN, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

To the Honorable the Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States.

Emerson R. Gynn, your petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered June 11, 1958 dismissing an appeal from a judgment of the Court of Appeals of Ohio, Cuyahoga County, Eighth District, in a civil case. (R. 119)

OPINIONS BELOW

The opinion of the Court of Common Pleas of Cuyahoga County, State of Ohio, rendered April 11, 1957 is not reported. The same is contained in pages 30 to 34 of the certified transcript of record filed herein.

The opinion of the Court of Appeals of Cuyahoga County was rendered February 20, 1958, is reported at 78 *Ohio Law Abstract* 359 and is contained in the certified transcript of record filed herein.

The opinion of the Supreme Court of Ohio dismissing the appeal is reported at 168 *Ohio State Reports* 164; 151 N. E. 2d 56; 31 *Ohio State Bar Association Reports* 599, is contained in the certified transcript of record filed herein and in the appendix to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, Section 1257 (3) United States Code.

The judgment of the Supreme Court of Ohio was entered June 11, 1958.

By Order dated September 5, 1958. Justice Burton of this Court extended the time for the filing of a petition for a writ of certiorari to and including November 8, 1958.

QUESTIONS PRESENTED

I.

Where a citizen files answer to a divorce suit while a prisoner in a state penitentiary *pro se*, and while not in default; a motion to advance trial date is granted without notice of time, date or place of hearing, and where without notice to him of the ruling on the motion, or the date, time and place of trial, judgment is rendered at trial in his absence awarding all of his property to his wife, is he deprived of property without due process of law under the 14th Amendment?

II.

Before entry of judgment divesting him of his property, does Amendment 14 require notice of some sort to a prisoner in a state penitentiary, (1) of the date, time and place of hearing on a motion to advance the trial date of a cause in which he has filed answer and is not in default, (2) of the ruling of the court on the motion, and (3) of the date, time and place of the trial, such that he might arrange to be represented at such trial?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, Section 1, of the Constitution of the United States, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 16 of the Constitution of the State of Ohio, provides:

> "Of redress in courts. All courts shall be open and every person, for injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

STATUTE INVOLVED

Section 2325.01 of the Revised Code of Ohio provides, in pertinent part:

> "The Court of Common Pleas or the Court of Appeals may vacate or modify its own final order, judgment or decree after term at which it is made:
>
> "• • •
>
> "(C) For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order."

STATEMENT

On March 20, 1952 respondent Mary P. Gynn filed a petition for divorce and equitable relief against petitioner Emerson R. Gynn in the Court of Common Pleas of Cuyahoga County, Ohio. The petition sought a divorce

upon the grounds of gross neglect of duty and an adjudication of property rights. (Supp. R. 1)

On date of the filing of the petition for divorce and at all times from July 15, 1951 to and including August 21, 1953, Emerson R. Gynn was incarcerated in the Ohio State Penitentiary. (R. 42; 56)

Petitioner was then, and now is, blind. (R. 69) The writ was served upon him in the Penitentiary March 28, 1952. Acting as his own attorney, he filed an answer to the petitioner *pro se* May 9, 1952. (Supp. R. 4)

On May 21, 1952 petitioner received a copy of a "motion" to advance the cause for trial. This copy of the "motion" did not indicate the time or place for the holding of the hearing on the motion. (R. 72) This "motion to advance the cause for immediate trial" was never duly filed, nor was the same ever placed upon the docket.

Despite the fact that the said "motion" was never duly filed or received by the Clerk of the Court, there appears, (*not of record*), in the file containing papers in the case such a "motion". On the cover of the "motion" there was endorsed the following notation: *"5/28/52 Granted. Order for top of list June 9, 1952. Defendant to be ordered to court for trial. (Signed) Artl, Judge".* (R. 37) Of course Emerson R. Gynn was not present at the time of the granting of the "motion" nor was he, in fact, ever notified of the time and place of the hearing on the motion and, indeed, it is not of record when such a hearing, was held.

It is clear, therefore, that in this case an order was entered in an irregular manner advancing this cause for trial without notice to petitioner as to time and place of hearing. Moreover, the order (*not of record*) dated May 28, 1952 advancing the cause for trial on June 9, 1952 was never served upon petitoner. Petitioner knew nothing of the granting of the motion nor was he ever advised of the trial date.

In the papers in the file of the case *but not of record* there appears a subpoena directed to "R. W. Alvis, Warden, Ohio State Penitentiary, Columbus, Ohio" requiring the warden to attend court June 9, 1952 "and bring with you Emerson R. Gynn #91741 Inmate". (R. 112) The subpoena was served upon Warden R. W. Alvis May 31, 1952. (R. 41) In accordance with the policy of his institution, Warden Alvis did not honor the subpoena and filed the same in the record of the inmate who had no access to his file. (R. 41) Emerson R. Gynn was not notified of the receipt of the subpoena. (R. 42) Emerson R. Gynn had no notice of the trial date. (R. 69) The petitioner Emerson R. Gynn wrote a letter to the Clerk of the Court of Common Pleas dated June 14, 1952 from the Penitentiary in which he requested information concerning the status of his case as follows:

> "Kindly forward me status of case number 635,426. Mary P. Gynn v. Emerson R. Gynn giving disposition of defendant's answer and date which case may be heard, together with information pertinent to the disposition of the case." R. 31; 70; 110)

On June 24, 1952 petitioner received a reply from the Clerk dated June 20, 1952 concerning his case: "*This is to advise you that the above-entitled case is still pending in the Court of Common Pleas and will probably be heard in approximately one month.*" (R. 31; 70; 110) Even though the Clerk advised petitioner of a probable trial date one month from June 20, 1952, the Clerk based his opinion upon the matter entered in the docket and, of course, this cause had been advanced, not of record. (R. 65)

The case was in fact heard on June 9, 1952 in the Court of Common Pleas in the absence of petitioner. Of course there was no attorney to represent him because he had never engaged an attorney and no attorney ever entered an appearance for him. (R. 58) The Court of Common Pleas awarded Mary P. Gynn a divorce upon ground of

gross neglect of duty and gave title to all of Emerson R. Gynn's considerable property, including valuable real estate to Mary P. Gynn. (Supp. R. 7) A certified copy of the decree was mailed to petitioner by counsel for Mary P. Gynn which was received July 8, 1952. This was his first knowledge of the trial.

Petitioner was released from the Penitentiary August 21, 1953. On July 1, 1955 petitioner filed in the Court of Common Pleas a petition to vacate the judgment of divorce and property award, *pro se*, entitled, "Petition to Vacate Journal Entry." (R. 9) The petition was filed pursuant to Chapter 2325.01 of the Revised Code of Ohio which provides in part:

> "The Court of Common Pleas or the Court of Appeals may vacate or modify its own final order, judgment or decree after term at which it is made:
>
> " • • •
>
> "(C) For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order."

The petition to vacate set forth the following acts of mistake, neglect or omission by the Clerk and/or other reasons why the judgment was irregularly had and obtained:

> 1. Failure to note upon the record the filing of the motion to advance the cause for immediate trial thereby preventing it from being formally before the Court and precluding it from public notice.
>
> 2. Acceptance of the motion to advance without a date, time or place of hearing being a part thereof which prevented petitioner from any notice of date, time or place of hearing, "thus precluding the Defendant from his rights under the Law."
>
> 3. Failure to notify petitioner of the ruling of the Court upon the motion.
>
> 4. Failure to note upon the record the Court's ruling upon the motion.

5. Failure to notify petitioner of date, time and place of trial.

6. Advising petitioner by letter dated June 20, 1952 eleven days after the trial that the cause would be heard in approximately one month.

The petition to vacate, filed July 1, 1955 was timely filed. Chapter 2325.10 Revised Code of Ohio fixes the period of limitations for the filing of petitions to vacate under Chapter 2325.01 as three years. On July 15, 1955 petitioner also filed an amended Answer and Cross-Petition. (R. 12) A hearing was held upon the petition to vacate. (R. 46) The pertinent portions of the evidence adduced at the hearing have already been set forth in this statement. On April 11, 1957 Judge Thomas of the Court of Common Pleas rendered an opinion denying the petition to vacate. (R. 28) Judgment was entered upon the Journal or Docket, May 11, 1957 as follows: "Defendant's petition to vacate denied. *Judgment in favor Plaintiff.* Defendants excepts. No record. Thomas J. Divorce Journal 342 Page 304."

On May 21, 1957 petitioner filed a motion for new trial. (R. 35) The motion for new trial was upon grounds, inter alia:

"4. That the finding and judgment of the Court, refusing to vacate the entry of judgment, decree and final order of divorce, and distribution to the plaintiff of all of defendant's property, without notice of the day, hour, place of hearing and an opportunity to be heard, constitutes the taking of his rights and property without due process of law, as guaranteed by Article I, Section 16 of the State of Ohio, and of Article XIV (Fourteenth Amendment) of the Constitution of the United States.

5. That the Court erred in denying the defendant his right to due notice of the day, hour and place the trial was to be heard, as provided by the Constitution of the State of Ohio, and the Constitution of the United States.

6. That the Court erred in considering the service of a subpoena on Warden R. W. Alvis, as notice to the defendant of the day, hour and place of the divorce trial, as guaranteed by the Constitution of Ohio, and of the Constitution of the United States.

. . . . . .

8. That the finding and judgment of the Court refusing to vacate the entry of judgment, decree and final order of divorce and distribution to the plaintiff of all of defendant's property journalized on July 1, 1952, without opportunity of defendant to be heard, constitutes the denial to the defendant of the equal protection of the law, as guaranteed by Section 16, Article I, of the Constitution of the State of Ohio, of Article XIV (Fourteenth Amendment) of the Constitution of the United States."

Petitioner requested an oral hearing upon the motion for new trial. (R. 36) On June 26 the motion for new trial was over-ruled by Judge Thomas of the Court of Common Pleas. Seasonably, on August 14, 1957 petitioner filed a notice of appeal.

The Court of Appeals, 8th District Cuyahoga County, Ohio, heard the appeal upon argument of counsel. On February 20, 1958 the Court of Appeals rendered its opinion. The Court of Appeals ruled as follows: (1) "*The judgment of the court journalized May 11, 1957, over-ruling defendant's 'petition' to vacate judgment, is, therefore, affirmed*" (and) . . . . (2) "There is no statutory right to seek a retrial in such special proceeding after the court judgment has been journalized. The time within which a notice of appeal must be filed is, therefore, not tolled after the journalization of such judgment by filing a motion for a new trial. A notice of appeal filed ninety-five days after the order from which the appeal is taken does not vest this court with jurisdiction of the appeal. We are, therefore, constrained to hold that this court is without jurisdiction to entertain this appeal."

The Court of Appeals did not specifically rule upon the question as to the denial of "due process" to petitioner under Amendment XIV although it was briefed and argued.

Petitioner pursued his appeal to the Supreme Court of Ohio, again setting forth that he was denied equal protection of the law and deprived of property without due process of law in violation of Amendment XIV of the Constitution of the United States. (R. 118) Despite the presentation of all of the facts above-mentioned, on June 11, 1958 the Supreme Court of Ohio filed its opinion dismissing the appeal upon the ground that no debatable constitutional question was involved. (R. 119)

REASONS FOR ALLOWING THE WRIT

Whether or not a citizen has been deprived of property without due process of law under Amendment XIV of the Constitution of the United States who while a prisoner in a state penitentiary files answer to a divorce suit *pro se* and while not in default, a motion to advance the cause for immediate trial is granted without notice, actual or constructive, to him of the time, date and place of the hearing on the motion, and without notice to him of the action of the court upon the motion and without any notice of the date, time and place, a trial is conducted in his absence and judgment entered awarding all of his real estate and other property to his wife, is a substantial question that has not been decided by this Court.

Here the Supreme Court of Ohio decided this question by saying: "The appeal of right herein is dismissed for the reason that no debatable constitutional question is involved". This decision conflicts with the applicable decisions of this Court. Moreover, the judgment of the trial court awarding petitioner's property to his wife without actual or constructive notice of trial date, time

or place offends traditional notions of fair play and substantial justice. Because the question herein presented is one of utmost importance to citizens generally, and because of the fact that without some pronouncement from this Court upon the subject, the right of a litigant not in default, to notice of time, date and place of trial whereby he is to be divested of his property may be gradually eroded to the point of non-existence and the 14th Amendment's guarantee of due process in cases of this sort may become imperiled.

ARGUMENT

A Judgment Against Party Not in Default Rendered Without Notice of Trial Date Set at a Hearing of Motion to Advance Cause for Trial Also Without Notice to the Party as to Time or Place of Hearing, is a Deprivation of Property Without Due Process of Law and Is Void Under Amendment XIV

Petitioner who was blind and incarcerated in the Ohio State Penitentiary at Columbus, Ohio, at the time of the filing of respondent's petition for divorce and property adjudication, filed his answer to the petition *pro se*. The proceeding whereby the cause was advanced for immediate trial was highly irregular. The motion for advancement was never entered upon the journal or docket. The motion, served upon petitioner by mail, did not contain any indication of date or time of hearing. The Court advanced the trial for hearing June 9, 1952 despite the clear fact that petitioner knew nothing of the hearing. Petitioner was given no notice whatsoever of the advanced trial date. The Court caused a subpoena to be issued to R. W. Alvis, Warden of the state penitentiary directing him to appear and bring Emerson R. Gynn, inmate to testify as a party defendant on June 9, 1952. (R. 112) This subpoena was never filed of record. The subpoena, being issued from Cuyahoga County, was of no legal effect in Franklin County where served upon the Warden. There

is no doubt but that the Court knew that the warden would ignore the subpoena. Not only did the Warden refuse to honor the subpoena but he did not notify petitioner of its service, existence or contents. (R. 42; 55) These facts were adequately presented at the time of the hearing on petitioner's motion to vacate the judgment. Judge Thomas of the Court of Common Pleas filed an opinion denying petitioner's motion in which he states:

> "It is further concluded that there was no irregularity in obtaining the judgment. The issuance of the subpoena and its service upon Warden Alvis directing him to bring the defendant to testify on June 9, 1952 represented an effort, beyond the requirements of either the statutes of the state or the rules of this court, to give notice of the trial to the defendant. Even though the Warden might not by law have been required to produce the defendant, the subpoena not originating in the same or an adjoining county, it was reasonable to assume that he would have at least communicated notice of the time of trial to the defendant. The circumstances warranted the finding in the decree that the defendant was 'duly notified by this court and directed to appear for the trial of this case which was set for trial on the 9th day of June, 1952.'" (R. 33)

Judge Thomas admits that the Warden was not required by law to honor the subpoena. Although he had before him the deposition of Warden Alvis in which the Warden testified that he had no record of petitioner being notified of the subpoena, Judge Thomas sustained the finding of the trial judge on the apparent basis that it could be presumed that the Warden would notify petitioner. Under the law of Ohio there can be no such presumption of notice. *Hettrick* v. *Wilson*, 12 O.S. 136; *Modica* v. *Modica*, 11 O.L.A. 667, 17 O. Jur. 2d, 733.

The law with regard to the lack of sufficiency of such "notice" under Amendment 14 is stated in *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 424; 59 L. ed. 1027, 1032:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires."

Moreover, we are told in *Truax v. Corrigan*, 257 U.S. 312, 324; 66 L. ed. 254, 259:

> "In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

A judgment was rendered by the Court of Common Pleas divesting petitioner of all of his real estate and other property and awarding the same to his wife June 9, 1952. Petitioner was not in default and was entitled to be notified of trial date so that he might arrange to be present through counsel if not in person. The customary letter from the Assignment Room of the Court of Common Pleas to out-of-County parties and their attorneys notifying them of the date, hour and place of trial *WAS NOT MAILED to petitioner.* (R. 85-86) This was the only regular method of notifying an out-of-county party of trial date. (R. 65) Further, petitioner wrote to the Clerk of the Court to inquire as to the status of his case on June 14, 1952, five days after the trial of which he had no notice. (R. 110) The Clerk by letter dated June 20, 1952 advised petitioner that the case was still pending and would probably be heard in approximately one month. (R. 111) On July 8, 1952 petitioner received a letter from the attorney for respondent enclosing a certified copy of the judgment indicating

the case had been heard June 9, 1952. (R. 70) This was his first notice of the hearing of the case.

As of May 11, 1957 the following entry was placed upon the journal or docket: "Defendant's petition to vacate denied. *Judgment in favor Plaintiff* . . ." Seasonably, 10 days later petitioner filed a motion for new trial. (R. 35) In this motion petitioner alleged that he had been denied due process of law under Amendment 14 of the Constitution of the United States in that he had been deprived of property without due process of law and that he had been denied equal protection of the law.

This case is not one of mere irregularity in obtaining a judgment but it involves the denial of the substantial right of being notified of the date and time of a trial whereby one's property was taken away from him and given to another. This is a right guaranteed to all citizens under Amendment XIV.

Here, to be sure, petitioner was effectively made a party by service of the petition upon him in the penitentiary. In a sense he "appeared", for he filed an answer. But are these almost mere formalities sufficient to insure "due process" when he was not notified of trial date? There is no rule of law which admits of the presumption that even if he had been notified he would not have appeared through counsel to cross-examine witnesses and that he might not have produced evidence and witnesses in his own behalf even though confined to the penitentiary. The effect of the failure to notify him of trial date, time, and place, places petitioner in the same position, insofar as his rights under Amendment 14 were concerned, as though he had never appeared and had never been served with the initial pleading in the case such that the law in *National Exchange Bank* v. *Wiley*, 195 U.S. 257, 269; 49 L. ed. 184, 190 applies, wherein Justice Harlan, speaking for the Court said:

> ". . . for it is thoroughly settled that a personal judgment against one not before the court by actual service of process, or who did not appear in person or by an authorized attorney, would be invalid as not being in conformity with due process of law."

In *Ochoa* v. *Hernandez Y Morales*, 230 U.S. 139, 161; 57 L. ed. 1427, 1437, this Court held:

> "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that Charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

Due notice and a reasonable opportunity to be heard to present one's defense are two fundamental conditions universally prescribed in all systems of law established by civilized countries. Petitioner was not given due notice nor any reasonable opportunity to be heard. The judgment of the Ohio Supreme Court which implied that there was no substantial constitutional question involved should, therefore, be reversed.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari to the Supreme Court of Ohio should be granted.

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November 7, 1958

APPENDIX

Opinion of the Supreme Court of Ohio

GYNN, *Appellee*

v.

GYNN, *Appellant*

No. 35614

SUPREME COURT OF OHIO

June 11, 1958

Appeal from Court of Appeals, Cuyahoga County.

HARRISON M. CRELLIN, Cleveland, for appellant.

ARTHUR E. GRIFFITH, Cleveland, for appellee.

Per Curiam

The appeal of right herein is dismissed for the reason that no debatable constitutional question is involved.

Appeal Dismissed

WEYGANDT, C. J. and ZIMMERMAN, STEWART, TAFT, MATTHIAS, BELL and HERBERT, J. J., concur.

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Respondent.

BRIEF OF RESPONDENT.

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EMERSON R. GYNN,

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BRIEF OF RESPONDENT.

QUESTIONS PRESENTED.

I.

Should this Court grant certiorari with respect to a state supreme court judgment which dismissed petitioner's appeal following his failure to perfect a seasonable appeal to the state's intermediate appellate court?

II.

Does the Fourteenth Amendment's requirement of due process require a state court to give direct, personal notice of the date and hour of a divorce trial to a party who acts as attorney *pro se*, where that party has been served with summons and a copy of the complaint, has entered his appearance by filing an answer and has been notified constructively of the immediacy of trial by the court's publication of the case in the "Active List" of its official daily newspaper?

STATEMENT OF THE CASE.

On March 20, 1952 respondent filed a petition for divorce and equitable relief against petitioner in the Court of Common Pleas of Cuyahoga County, Ohio. Petitioner was then a prisoner in the Ohio State Penitentiary. Within eight days after the action was commenced, petitioner was served with summons and a copy of the divorce petition. Six weeks later, acting as attorney *pro se*, petitioner filed his answer to the petition.

Respondent thereafter filed a motion to advance the cause for trial. Counsel for respondent mailed a copy of this motion to petitioner. The motion was granted on May 28, 1952, and the case was ordered to the top of the trial list for June 9, 1952. The judge who advanced the case for trial issued a subpoena to the warden of the Ohio Penitentiary directing him to bring petitioner to Cleveland on June 9, 1952 to testify as a party defendant in the cause. The warden did not honor the subpoena or advise petitioner of the trial date.

Pursuant to the rules of practice of the Common Pleas Court, the case was published in the "Active List" of the Daily Legal News, the court's official newspaper. It so appeared on June 6, 1952. On June 9, 1952, the case came on for trial, the petitioner not appearing or being represented by an attorney. On the following day, June 10, 1952, a divorce decree was entered in favor of respondent as a part of which provisions were made for an award of property to her. On July 8, 1952 petitioner received a certified copy of the di orce decree.

Petitioner made no move to challenge the decree during the three years that followed. He remained in the Ohio Penitentiary until August 21, 1953. On July 1, 1955, two years after his discharge, he filed in the Court of Common Pleas a petition to vacate the divorce decree

upon the statutory ground that there had been "mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order." Ohio Revised Code, Sec. 2325.-01 (C). A hearing was held on this petition. The Court of Common Pleas concluded that there had been no irregularity in obtaining the judgment as would warrant the vacation of the divorce decree. The petition to vacate was denied on May 11, 1957.

Instead of appealing from this judgment to the Court of Appeals, petitioner filed a motion for new trial in the Court of Common Pleas. The motion for new trial was filed on May 21, 1957, and it was overruled on June 26, 1957. On August 14, 1957 petitioner filed a notice of appeal in the Court of Appeals.

The Court of Appeals concluded, *inter alia*, that it was without jurisdiction to entertain the appeal, inasmuch as petitioner had failed to appeal to the Court of Appeals within the jurisdictional time specified by statute (20 days following the rendition of a final order in the trial court). Ohio Revised Code, Sec. 2505.07(A). The Court of Appeals held that the petition to vacate the divorce decree under Sec. 2325.01 was a special statutory proceeding essentially in the nature of a motion for new trial after term and that there was no statutory authority for petitioner's motion for a new trial as to the order of the lower court denying the petition to vacate. It stated, in effect, that a motion for new trial could not lie as to an order overruling a motion for new trial; the second motion for new trial would not toll the time for appealing from the denial of the first motion. As the Court of Appeals stated:

> "One other question appearing in the record should be here considered and that is whether the notice of appeal, filed August 14, 1957, vested this court with jurisdiction of this appeal.

"This is a special proceeding by which a party to an action seeks a new trial upon the vacation of judgment after term. Section 2325.01 Revised Code, as applicable here, provides in part:

'The Court of Common Pleas or the Court of Appeals may vacate or modify its own final order, judgment, or decree after the term at which it was made:

'* * *

'(C) For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order.'

"* * * There is no provision of the statute providing for a retrial of the questions presented by a party seeking relief from a judgment after term under Section 2325.01, Revised Code. While an order entered under these sections is a final order * * * that is, an order affecting a substantial right made in a special proceeding, and is, therefore appealable, it is not, in fact, a final determination of the rights of the parties *to which a motion for new trial may be addressed.*

It is in legal affect a motion for new trial especially provided for after term upon the specific grounds set out by Section 2325.01, Revised Code. *There is no statutory right to seek a retrial in such special proceeding after the court judgment has been journalized.* The time within which a notice of appeal must be filed is, therefore, not tolled after the journalization of such judgment by filing a motion for new trial. A notice of appeal filed 95 days after the order from which the appeal is taken does not vest this court with jurisdiction of the appeal. We are, therefore, constrained to hold that this court is without jurisdiction to entertain this appeal.

"Judgment accordingly." (Emphasis supplied.) 106 Ohio App. 132, 135-136.

The Court of Appeals also stated, before holding that it was without jurisdiction to entertain the appeal, that it

had examined the record carefully and was satisfied that there was credible evidence in support of the conclusion of the Common Pleas Court that no irregularity was established on the record to warrant vacation of the divorce decree.

Petitioner appealed as a matter of right to the Supreme Court of Ohio charging violation of the due process requirement of the Fourteenth Amendment. The Supreme Court dismissed the appeal "for the reason that no debatable constitutional question is involved." 168 Ohio St. 164; 151 N. E. 2d 46.

ARGUMENT.

I. CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE STATE APPELLATE COURTS DID NOT DIRECTLY RULE ON ANY SEASONABLY PRESENTED CONSTITUTIONAL QUESTION.

It is settled that this Court will not review the decisions of state courts which are founded upon nonfederal grounds. It is likewise settled that where the decision of a state court rests upon a federal ground and an independent nonfederal ground, and its decision as to the nonfederal ground is adequate to support its judgment, this Court will not take jurisdiction. *Fox Film Corporation v. Miller*, 296 U. S. 207, 56 Sup. Ct. 183; *Cuyahoga River Power Company v. Northern Realty Company*, 244 U. S. 300, 37 Sup. Ct. 643. It has also been held that this Court will not question the correctness of the state court's judgment on the nonfederal ground unless it was an obvious subterfuge to evade consideration of a federal issue. *Radio Station W. O. W., Inc. v. Johnson*, 326 U. S. 120, 65 Sup. Ct. 1475.

The judgment of the Supreme Court of Ohio was merely that "no debatable constitutional question is involved."

In view of the explicit holding of the Court of Appeals that it lacked jurisdiction to entertain the appeal, the subsequent judgment of the Supreme Court dismissing petitioner's appeal is explicable only on the hypothesis that a constitutional question was not "debatable" because it had not been presented seasonably. This view of the Supreme Court's judgment would seem more appropriate under the circumstances of the present case than an assumption that the court actually considered the merits. Since its judgment would appear to be founded on jurisdictional grounds relevant to state procedural law, and not upon a seasonably presented constitutional issue, certiorari should not be granted.

II. THE FOURTEENTH AMENDMENT DOES NOT REQUIRE A STATE COURT TO GIVE DIRECT PERSONAL NOTICE OF THE DATE AND HOUR OF A DIVORCE TRIAL TO A PARTY WHO ACTS AS ATTORNEY PRO SE, WHERE THAT PARTY HAS BEEN SERVED WITH SUMMONS AND A COPY OF THE COMPLAINT, HAS ENTERED HIS APPEARANCE BY FILING AN ANSWER AND HAS BEEN NOTIFIED CONSTRUCTIVELY OF THE IMMEDIACY OF TRIAL BY THE COURT'S PUBLICATION OF THE CASE IN THE "ACTIVE LIST" OF ITS OFFICIAL NEWSPAPER.

Procedural due process comprehends notice of a charge and reasonable opportunity to defend against it before a tribunal which will give a fair hearing. The opportunity to be heard demanded by the Fourteenth Amendment is not something larger than opportunity. The Amendment does not guarantee that the requisite opportunity will be wisely used. It does not require states to take unusual steps to save harmless those whose imprudence nullifies the opportunity which the law fairly accords. Once a reasonable opportunity to defend has been

given, subsequent improvidence will not create a constitutional issue.

Petitioner here was duly served with summons and a copy of the petition for divorce. He knew of the precise charge, the court in which it would be tried, and the time by which he would have to answer. He was thus given an opportunity to make his defense. What he did with that opportunity was up to him.

Since petitioner was a layman and in prison, it was impossible for him to act effectively as an attorney in any cause. However, rather than engage counsel through Legal Aid or otherwise, or instead of communicating with the court to seek a stay of proceedings until his disability ended, petitioner resolved to act as attorney *pro se*, and in this capacity he filed an answer to the petition.

The Court of Common Pleas had no rule of court which provided for the issuance of direct personal notice to parties or attorneys of the date and hour on which their cases might be reached for trial. Pursuant to rule of court however the present case was published in the "Active List" of civil cases in the court's official newspaper, and the immediacy of its trial was thereby indicated. On the third day after publication it was called for trial. Petitioner's lack of knowledge of this is solely attributable to his decision to act as his own legal representative.

The court actually went further than required by statute or its own rules of practice to safeguard petitioner's interests. One of the judges of the court issued a subpoena to the warden of the penitentiary directing that petitioner be brought to Cleveland to attend the trial of the action. While the warden was not legally obligated to conduct the prisoner to a county farther away than an adjoining county, there is nothing in the record to suggest that at

the time the court issued its subpoena it considered that it was acting in vain.

The record establishes that petitioner was fully notified of the charge against him and had opportunity to arrange for a competent defense. It establishes that three days prior to trial, pursuant to rule of court, the immediacy of trial was indicated through publication of the case in the court's official newspaper. It further attests to an extraordinary effort by the court to have petitioner actually brought to Cleveland for trial. There is nothing to suggest that petitioner received any lesser degree of notice than any other party with a cause before the court. Though petitioner claims he was entitled to direct personal notice of the date and hour of trial, it is perhaps significant that he fails to mention any statute that was violated or any rule of court which was overlooked. Indeed, he cites no authority of any kind for the proposition that due process was denied him.

The petition should be denied.

Respectfully submitted,

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